

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application Serial No.: 78066081

For the Mark: A VOICE ABOVE THE CROWD

Applicant: Karen Commins

Filed on: May 28, 2001

02-19-2003

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #7C

RE/MAX INTERNATIONAL, INC.,)
Opposer,)

Opposition No.: 91154394

v.)

KAREN S. COMMINS,)
Applicant.)

Box TTAB No Fee
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

RESPONSE TO OPPOSITION

The registration of the mark A VOICE ABOVE THE CROWD sought in U. S. Trademark Application Serial No. 78066081 filed on May 28, 2001 by Karen S. Commins, an individual doing business and located at 1679 Walden Pond Road, Suwanee, Georgia 30024 (hereafter "Applicant"), will not deceive potential consumers of or cause any harm, damage or other consequence to RE/MAX International, Inc., a Colorado company (hereafter "Opposer").

Rebuttals to the grounds for opposition are as follows:

1. The Applicant admits that RE/MAX franchisees and independent sales associates (the "RE/MAX Network") are authorized to use the RE/MAX trademarks when providing real estate brokerage services.
2. The Applicant admits that the Opposer owns the U.S. Trademark Registration No. 2,202,802 for the service mark "ABOVE THE CROWD" and Federal Trademark Registration Number 1,158,371 for the service mark "ABOVE THE CROWD". The Applicant has no knowledge when those in the RE/MAX Network first used the Opposer's "ABOVE THE CROWD" trademark. To the extent that any other response is required, this paragraph is denied.
3. The Applicant has no knowledge that the Opposer has provided any support services to those in the RE/MAX Network specifically related to the "ABOVE THE CROWD" mark. The Opposer did not provide any proof of ownership of Federal Trademark Registration 2,210,739 for the service mark "ABOVE THE CROWD". To the extent that any other response is required, this paragraph is denied.
4. The Applicant admits that the registrations may be collectively referred to as the "ABOVE THE CROWD marks", except for the registration denied in paragraph 3. To the extent that any other response is required, this paragraph is denied.
5. The Applicant has not observed examples of the ABOVE THE CROWD marks used on every type of advertising media listed in Opposer's grounds. Instead, the Applicant has observed that much of the advertising produced by the Opposer

does not include any ABOVE THE CROWD marks. To the extent that any other response is required, this paragraph is denied.

6. The Applicant denies paragraph 6 of the Notice of Opposition. The Opposer has not engaged in extensive advertising and promotion of the phrase ABOVE THE CROWD. In addition, the Opposer cannot demonstrate that any advertising it has done has been so extraordinarily effective that the average person would automatically correlate the phrase "ABOVE THE CROWD" with real estate brokerage services.
7. The Applicant admits paragraph 7 in the Notice of Opposition.
8. The Applicant denies the allegations contained in paragraph 8 in the Notice of Opposition. The Applicant's mark A VOICE ABOVE THE CROWD has a completely different appearance and connotation from the ABOVE THE CROWD marks and is directed at a different target audience who would never confuse or associate her voice-over business in any way with real estate brokerage services or the RE/MAX Network, much less dilute the ABOVE THE CROWD marks or cause any financial harm to the Opposer.
9. The Applicant denies the allegations contained in paragraph 9 in the Notice of Opposition. The Opposer's ABOVE THE CROWD marks are not famous. It is highly unlikely that consumers would mistakenly confuse voice-over services with real estate brokerage services or the RE/MAX network. Consumers are not at all likely to presume a connection between the two entities.

10. The Applicant denies the allegations contained in paragraph 10 in the Notice of Opposition. Since the Opposer's ABOVE THE CROWD marks are neither distinctive nor famous, no dilution is likely to occur.
11. The Applicant admits that her use of the phrase A VOICE ABOVE THE CROWD is not authorized by the Opposer. The Applicant further states that the Opposer's authorization is not required for the Applicant to register the trademark A VOICE ABOVE THE CROWD for her voice-over services described in Application Serial No. 78066081.
12. The Applicant denies the allegations contained in paragraph 12 in the Notice of Opposition. The registration of the Applicant's A VOICE ABOVE THE CROWD mark on the Principal Register would have absolutely no bearing on the Opposer and would be consistent with the intent and spirit of all applicable trademark laws.

Affirmative defenses to the grounds for opposition:

1. The Opposer entered these proceedings with unclean hands. The Opposer filed 3 extensions of time to file the opposition. On each extension, the Opposer stated that the additional time was needed to initiate or complete communication with the Applicant. Each request contained the statement: "This Request for an Extension of Time is not being made for the purpose of mere delay." However, the Opposer only communicated with the Applicant on one occasion, and the Applicant did not receive that correspondence until October 28, 2002, after the first extension of time had expired. The Applicant

sent a letter to the Opposer on November 15, 2002, but the Opposer did not respond and chose instead to file a third extension of time, citing the same need to communicate with the Applicant. The Opposer acted in bad faith since the extensions of time were requested with the sole purpose of delaying these proceedings.

2. The Applicant has rights under both the First Amendment and fair usage principles to use the words ABOVE THE CROWD as part of a trademark since they form a common, descriptive phrase with pervasive usage in the English language that is not associated with the Opposer's mark.
3. The Opposer has acquiesced in the non-authorized usage of the phrase ABOVE THE CROWD. On February 15, 2003, the Applicant performed an Internet query on the popular search engine Google and found over 23,000 pages containing the phrase "ABOVE THE CROWD" without the words REMAX or RE/MAX appearing on the same page as the key phrase (Exhibit A). The Opposer has not produced any evidence to show that it has opposed the widespread usage of the phrase "ABOVE THE CROWD" when not referring to real estate brokerage services or the RE/MAX Network.

WHEREFORE, Applicant Karen S. Commins prays that the opposition to U. S. Trademark Serial No. 78066081 be rejected and that the registration on the Principal Register of the Applicant's mark A VOICE ABOVE THE CROWD be processed without further delay.

Respectfully submitted on this 19th day of February, 2003

By: Karen Commins[★]
Karen Commins

APPLICANT

Certificate of Service

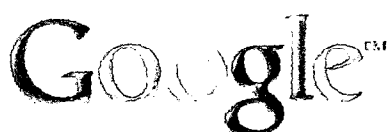
I certify that the foregoing Response to Notice of Opposition in the matter of RE/MAX International, Inc., Opposer v. Karen S. Commins, Applicant, Opposition Number 91154394, U.S. Patent and Trademark Office, Trademark Trial and Appeal Board was sent by U.S. Postal Service overnight delivery to:

LeBoeuf, Lamb, Greene & MacRae, LLP
Attn.: John R. Posthumus, Opposer's Attorney
633 17th Street, Suite 2000
Denver, CO 80202

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Arlington, VA 22202-3513

2/19/03
DATE

Karen S. Commins[★]
Karen S. Commins



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http://www.google.com/search?hl=en&ie=UTF-8&oe=UTF-8&q=%22above+the+crowd%... 2/15/2003

Exhibit A

TTAB

A VOICE
*Above the Crowd*TM

February 19, 2003

Box TTAB No Fee
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

02-19-2003

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #71

Dear Sir:

I am enclosing my response to the Notice of Opposition, Opposition No. 91154394, in the matter of RE/MAX International, Inc., Opposer, v. Karen S. Commins, Applicant regarding the registration of my mark A VOICE Above The Crowd sought in U.S. Trademark Application Serial No. 78066081. You will find the Certificate of Service on the last page of the response, indicating that copies of this document were mailed concurrently via overnight delivery to both TTAB and the Opposer's attorney.

Please contact me if you need any additional information associated with this action.

Cordially,

Karen Commings

KAREN COMMINS
*A VOICE Above the Crowd*TM
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Voice Mail: 770.712.4767

E-mail: Voice-Overs@mindspring.com

Web: www.AVOICEAboveTheCrowd.com

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